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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945

No. 399

ROBERT HANNEGAN, Postmaster General  
of the United States,

*Petitioner,*

vs.

ESQUIRE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE AND BRIEF IN SUPPORT THEREOF**

AMERICAN CIVIL LIBERTIES UNION.  
*Amicus Curiae.*

CHARLES HORSKY,  
*of the District of Columbia Bar,*

✓ LUTHER ELY SMITH,  
*of the Missouri Bar,*

✓ ARTHUR GARFIELD HAYS,  
ASHER LANS,

✓ WHITNEY NORTH SEYMOUR,  
✓ NORMAN WILLIAMS, JR.,  
*of the New York Bar,*

✓ GURNEY EDWARDS,  
*of the Rhode Island Bar,*

*Of Counsel.*

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ESQUIRE, INC.

**Motion for Leave to File Brief as *Amicus Curiae***

*May it Please the Court:*

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the petitioner to the filing of this brief has been obtained. Attorney for the respondent has failed to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

October 1, 1945.

ARTHUR GARFIELD HAYS,  
*Counsel for American Civil Liberties  
Union, Amicus Curiae.*

IN THE  
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ESQUIRE, INC.

**BRIEF IN SUPPORT OF MOTION**

**Interest of the American Civil Liberties Union**

The American Civil Liberties Union is a nationwide, non-profit organization, whose members are laymen and lawyers interested in the preservation of the fundamental personal rights guaranteed to individuals by the Constitution of the United States and of the various states.

We are filing a memorandum on the petition for a writ of certiorari because of the extraordinary importance of this case. By a new and unique construction of an innocent-looking provision in the postal laws, the Postmaster General has here started a new policy, apparently to be widely applied, of restricting the circulation of literature through the mails in accordance with his personal opinion of its value. If this construction should be

1. Post Office Order No. 23,459, p. 5.

sustained and the Postmaster General should be thus vested with despotic powers of control over access to the mails, then freedom of circulation—which is essential to freedom of the press—will be seriously impaired.

While the opinion of the Court of Appeals, directing the lower court to enjoin the Post Office Department from enforcing its order of deprivation, unqualifiedly rejected the latitudinarian interpretation of his own censorial powers made by the Postmaster General, it proceeded on the level of moral instruction rather than constitutional argument. Consequently it did little to settle the vexing and important question of how far Congress has gone or may constitutionally go in vesting in the Postmaster General the power to allocate differential postal rates to periodicals in light of his judgment as to their literary merits or moral correctness. Moreover, as is pointed out in the Government's petition for a writ of certiorari, there is a considerable variance between the area of discretion held by the Court of Appeals to be Constitutionally delegable to the Postmaster General and the area permitted to be delegated in a number of older decisions by this Court.

We are supporting the Government's application for writ of certiorari, although we believe the order of the court below should be sustained, because we think this Court should take this opportunity to clarify the important constitutional questions involved in this case and to review the positions expressed in a different context, twenty-four years ago in *U. S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U. S. 407.

### **Reasons for Granting the Writ**

An authoritative decision by this Court of the constitutional questions (and the corollary questions of statu-



tory construction) posed by this case is important to ensure that the traditional American doctrine of freedom of the press shall not be vitiated by administrative indirection. It is established that neither the Postmaster General nor any other governmental official may constitutionally impose any direct previous restraint on the freedom of circulation of periodicals. However, the Postmaster General maintains that Section 14 of the Postal Classification Act (39 U.S.C. 226) requires him to admit to the especially cheap second class of mailable matter only those periodicals which make a "special contribution to the general welfare" (Post Office Order No. 23,459, p. 10).

Realistically speaking, deprivation of a periodical's second class mailing privilege greatly impairs its ability to compete effectively with other periodicals for the public's interest. It follows that deprivation of a periodical's second class entry because of the content of prior issues—the gravamen of the Postmaster General's order of revocation of *ESQUIRE*'s entry—constitutes the imposition of a brutally effective, albeit an indirect, previous restraint on freedom of circulation.

The decision of this Court in *United States ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*, 255 U. S. 407 (over the vigorous dissents of Mr. Justice Holmes and Mr. Justice Brandeis), establishes that the Postmaster General is not precluded by the First Amendment from withdrawing a second class entry when past issues of the affected periodical have contained non-mailable matter. See also the dissenting opinion of Mr. Justice Holmes in *Leach v. Carlile*, 258 U. S. 138, 140. The court below adroitly distinguished the *Burleson* case, *supra*, in a footnote on the ground that the revocation of a second class entry there involved was predicated upon previous publication of non-mailable matter.

We do not think this Court should permit freedom of circulation to depend upon so gossamer a thread. We think that this Court should avail itself of this opportunity to reconsider the doctrines enunciated in the majority opinion in the *Burleson* case and earlier cases,<sup>2</sup> particularly in the light of its more recent pronouncements in other civil liberties cases.<sup>3</sup> We urge, therefore, that the writ of certiorari prayed for be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,  
*Amicus Curiae.*

CHARLES HORSKY,  
*of the District of Columbia Bar,*

LUTHER ELY SMITH,  
*of the Missouri Bar,*

ARTHUR GARFIELD HAYS,  
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2. See e.g. *Ex Parte Jackson*, 96 U. S. 727; *In Re Rapier*, 143 U. S. 110; *Public Clearing House v. Coyne*, 194 U. S. 497.

3. As e.g. *Near v. Minn.*, 283 U. S. 697. The constitutional questions here invoked are admirably stated in the Brandeis-Holmes dissents in the *Burleson* case.